Hong Lee Trading & Construction Sdn Bhd v Taut Ying Realty Sdn Bhd

HIGH COURT (KUANTAN) — ORIGINATING SUMMONS NO 31-216 OF 1988
LAMIN J
22 OCTOBER 1990

Land Law — Acquisition of land — When is the land deemed to have been acquired — Land Acquisition Act 1960, ss 3, 4, 7, 8, 9, 10, 12, 16, 19, 22 & 23

The plaintiff company obtained a 25-year lease over two lots of land from the defendant company. In the lease agreement, a provision was made for the apportionment of compensation moneys should the said lands be compulsorily acquired. The compensation moneys were to be apportioned in a particular manner between them, depending on when the said lands were acquired. The lands were gazetted under s 8 of the Land Acquisition Act 1960 ('the Act') on 23 October 1981. The inquiry to determine the amount of the award was held on 29 October 1982. The award was offered by way of service of Form H dated 3 December 1982. The issue was when the said lands were deemed to have been acquired.

Held, determining the issue as follows:

(1) Under the Act, the initiation of the process of acquisition is normally preceded by two gazette notifications under ss 4 and 8. Section 4 is really a form of notice that certain land 'is likely to be needed'. At this point the land has not been acquired. Under s 8, when the State Authority decides that any such lands 'are needed', a declaration is published and is conclusive evidence that such lands are needed for the purpose specified. After that, the Collector shall make a note of the intended acquisition and commence proceedings for the acquisition by giving a notice in Form E calling for an inquiry to hear all claims to compensation. After the inquiry, a written award is prepared and offered by serving on persons interested.

(2) Under s 18 of the Act, the Collector may take possession upon service of the offer of the award (Form H) or any time thereafter, or under a certificate of urgency under s 19. However, the Act does not lay down the manner by which physical possession is to be effected. The Collector is not required to go to the land personally and it is sufficient if he authorizes someone to take possession.

(3) Section 22 of the Act provides that the Collector shall take formal possession by serving a notice in Form K on the proprietor and occupier. However, the Act is silent as to when formal possession shall be taken under s 22(1). By virtue of s 9(1) it appears that the Collector must make a note of the intended acquisition and it is also mandatory to take formal possession by serving a notice in Form K. Formal possession therefore takes place just about the time or soon after the declaration under s 8 is gazetted. At about the same time the Collector is to make a memorial to the effect that the land has been acquired and vested in the State Authority. At this point acquisition is effected or there is an act of acquisition as there is taking of possession and vesting of the land. The date of the memorial must be taken to be the date of acquisition. Therefore, the incidence of inquiry, the making of the award or its offer or the physical taking of possession are of no relevance in the determination of the issue.

[Bahasa Malaysia summary

Syarikat plaintif telah memperolehi pajakan bagi tempoh 25 tahun di atas dua lot tanah daripada syarikat defendan. Di dalam perjanjian pajakan, satu peruntukan telah dibuat untuk tujuan membahagikan wang pampasan sekiranya tanah-tanah itu diambil secara wajib. Wang pampasan itu akan dibahagikan antara mereka mengikut satu cara yang tertentu. Ini bergantung kepada masa bila tanah-tanah itu diambil. Tanah-tanah itu telah diwartakan di bawah s 8 Akta Pengambilan Tanah 1960 ('Akta itu') pada 23 Oktober 1981. Penyiasatan untuk menentukan jumlah pampasan telah diadakan pada 29 Oktober 1982. Pampasan telah ditawarkan dengan penyampaian Borang H yang bertarikh 3 December 1982. Isu yang berbangkit ialah masa bila tanah-tanah itu dianggap sebagai telah diambil.

Diputuskan, membuat keputusan seperti berikut:

(1) Di bawah Akta itu, permulaan proses pengambilan biasanya didahului oleh dua pemberitahuan warta di bawah ss 4 dan 8. Seksyen 4 sebenarnya ialah satu bentuk notis bahawa tanah yang tertentu 'is likely to be needed'. Di bawah s 8, bila Pihakberkuasa Negeri membuat keputusan bahawa mana-mana tanah tersebut 'are needed', satu deklarasi diterbitkan dan itu adalah bukti penuh bahawa tanah tersebut adalah diperlukan bagi tujuan yang dinyatakan. Selepas itu, Pemungut akan mengambil perhatian tentang pengambilan yang dihajatkan dan akan memulakan prosiding bagi pengambilan itu dengan memberikan notis dalam Borang E untuk melaksanakan penyiasatan untuk mendengar semua tuntutan bagi pampasan. Selepas penyiasatan itu, satu award bertulis disediakan dan ditawarkan dengan disampaikan kepada orang-orang yang berkepentingan.

(2) Di bawah s 18 Akta itu, Pemungut boleh mengambil milik pada masa penyampaian tawaran award (Borang H) atau bila-bila masa selepas itu, atau di bawah satu sijil mendesak (emergency certificate) di bawah s 19. Walau bagaimanapun, pemilikan fizikal harus dijalankan. Pemungut tidak diwajibkan pergi ke tanah itu sendiri dan adalah memadai jika beliau memberi kuasa kepada seseorang untuk mengambil milik.

(3) Seksyen 22 Akta itu memperuntukkan bahawa Pemungut harus mengambil milik secara rasmi dengan menyampaikan notis dalam Borang K kepada tuanpunya dan orang yang menduduki tanah itu. Walau bagaimanapun, Akta itu tidak menyatakan bila pemilikan rasmi boleh diambil di bawah s 22(1). Mengikut s 9(1), nampaknya Pemungut mesti mengambil perhatian tentang pengambilan yang dihajatkan itu dan adalah juga mandatori untuk mengambil pemilikan secara rasmi dengan menyampaikan notis dalam Borang K. Dengan itu, pemilikan rasmi berlaku kira-kira pada masa atau sejurus selepas deklarasi di bawah s 8 diwartakan. Kira-kira pada masa yang sama, Pemungut harus membuat memorial bahawa tanah itu telah diambil dan terletakhak pada Pihak berkuasa Negeri. Pada ketika itu, pengambilan dilaksanakan atau terdapat satu tindakan pengambilan kerana terdapat ambilmilik dan perletakhakan tanah itu. Tarikh memorial itu mesti diambil sebagai tarikh pengambilan. Lantaran itu, perjalanan penyiasatan, pemberian award atau penawarannya atau ambilmilik secara fizikal adalah tidak releven dalam menyelesaikan isu ini.]

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 02-512-90.]

Cases referred to

1 *Humuikari Bros* v *Asst Commissioner, Davwar Division* AIR 1962 Mys 169 (folld)
2 *Hong Bee Realty Ltd* v *Collector of Land Revenue, Kuala Lumpur* [1972] 1 MLJ 125 (distd)

Legislation referred to
Land Acquisition Act 1960 ss 3, 4, 7, 8, 9, 10, 12, 16, 19, 22, 23

SM Appaduray (*Bastian P Vendargon* with him) for the plaintiff.
Rajoo D Moothy for the defendant.

Cur Adv Vult

Lamin J: The plaintiff company in this case obtained a 25-year lease from the defendant company over two lots of land held under CT 4896 and CT 4897, lots 4292 and 4293 mukim of Kuala Kuantan. In cl 5 of the lease agreement a provision was made for the apportionment of compensation moneys, should the said lands be compulsorily acquired. Clause 5 of the said lease agreement reads:

> It is further agreed and declared that if the government or other competent authorities shall at any time during the term hereby created acquire the said lands or any part thereof compulsorily, the award or compensation payable in respect thereof shall be apportioned paid to and received by the parties hereto in the following manner:

Period of acquisition	To lessors	To lessee
within the 1st 5 years	50%	50%
within the 2nd 5 years	40%	60%
within the 3rd 5 years	33%	67%
within the 4th 5 years	40%	60%
within the 5th 5 years	50%	50%

Subsequently the said lands were compulsorily acquired by the acquiring authority in pursuance of the provisions of the Land Acquisition Act 1960. Awards were made and the compensation moneys apportioned and were paid by the acquiring authority on the 50%-50% basis as between the plaintiff and the defendant.

The said lease agreement commenced on 1 January 1977. For the purpose of the acquisition the lands were gazetted under s 8 on 23 October 1981. The inquiry to determine the amount of the award was held on 29 October 1982. The award was offered by way of service of Form H dated 3 December 1982.

The plaintiff company is seeking the determination of this court as to when the said lands were deemed to have been acquired.

Under the law the State Authority has the right to acquire any land which is needed for any of the purposes as laid down in s 3 of the Land Acquisition Act 1960. Under the Act, to initiate the process of acquisition, it is normally preceded by two gazette notifications, one under s 4 and the other under s 8. The notification under s 4 is really a form of notice to the public at large that certain land in a particular locality in the state 'is likely to be needed' for any of the purposes referred to in s 3 and with that preliminary investigation and survey of the said land will commence (s 5). Certainly at this point the State Authority has not acquired the land yet for it is still at the state of survey and investigation.

Under s 8 when the State Authority 'decides' that any of the lands referred to in Form C 'are needed', a declaration in Form D shall be published in the gazette. Subsection (3) of s 8 states a 'declaration' in Form D shall be 'conclusive evidence' that all the scheduled land referred to in the said form 'are needed' for the purpose specified therein. Upon publication of the declaration in Form D, the Collector shall then cause the areas 'affected by the acquisition' to be marked out upon the land (s 9(1)(a)) and the Collector shall make a note of the 'intended acquisition' (s 9(1)(b)) upon the appropriate register. Having done all that, the Collector shall 'commence proceedings for the acquisition of the land' by giving public notice in Form E which states that an inquiry to hear 'all claims to compensation' will be heard on a day fixed (s 10(1)). On the appointed date, the Collector shall make full inquiry into the value of all scheduled lands and then assess the amount of compensation in respect of each case (s 12). At the end of the inquiry the Collector will have to prepare a written award and then offer the award by serving it on each person interested in Form H (s 16(1)).

Now it may be observed that the gazette notification made under s 4 unlike that made under s 8 is not followed by an inquiry and assessment of compensation and finally the offer of the award. It is only to inform the public at large that lands in a particular locality as named are 'likely to be needed' and as such only investigations and survey will be carried out including other preliminary works as stipulated in Form B. It is a stage when the State Authority has not finally decided whether all those lands or part of them 'are needed'.

The assessment of compensation is based on 'market value' of the respective lands. If the gazette notification under s 8 is published within six months of that made under s 4, then compensation will be assessed based on the 'market value' of the land as at the date of publication in the gazette of the notification under s 4. In other cases, it is at the date of the publication in the gazette of the declaration under s 8.

There is another difference though the gazette that is published under s 4 is referred to as the publication of a notification because it is simply a notice and the marginal note reads 'Preliminary notice'. The marginal note for s 8 reads: 'Declaration that land is required for a public purpose.' So the gazette is really a publication of a 'declaration'. Section 8 is placed under the subhead 'Declaration of Intended Acquisition'. The gazette under the said section is said to be a publication of a declaration of intended acquisition, while s 4 comes under the subhead 'Preliminary Investigation'. Perhaps only in this respect our position is somewhat identical with the Indian position. It has been argued that under our law

acquisition takes place when lands are gazetted under s 8. But it has been said that under s 8 it is only a declaration of intended acquisition which means a declaration of only the intention to acquire. But s 8(1) states that 'When the State Authority *decides* that any of the lands referred to in section 7 *are needed* for any of the purposes referred to in section 3, *a declaration* in Form D shall be published in the gazette. The corresponding Indian provision is s 6(1) of the Land Acquisition Act 1894 and it is placed under a similar subhead 'Declaration of intended acquisition' carrying similar marginal note but perhaps with a different intent because it uses the words '... when the appropriate Government is *satisfied*' and not when it 'decides'. But s 6(1) of the Indian 1894 Act is subject to a couple of provisos. Before a declaration is made the 'appropriate Government' must be satisfied after considering a report, if any, of the objection proceedings under s 5A. Secondly, a declaration cannot be made unless the compensation awarded is to be paid by a company, or wholly or partly out of public revenues (*Compulsory Acquisition of Land in India* by OMP Aggarawala (5th Ed, 1985) at pp 192, 204, 208). Ours is a straightforward provision, and perhaps it would be more correct to say that it is a 'declaration of the State Authority's decision' and not merely a declaration of intention.

Would there be an act of acquisition upon taking physical possession of the land or formal possession with memorial registered in the appropriate register of titles? Section 18 states:

> The Collector *may* take possession
>
> (a) of any land in respect of which an award has been made under section 14, such possession being taken at the time of the service upon the occupier of such land of a notice in Form H, or at any time thereafter;
>
> (b) of any land specified in a Certificate of Urgency issued under section 19, whether or not any award has been made in respect of such land;
>
> Provided that the Collector shall not take possession of any part of any land under paragraph (b) which is occupied by any building, except in accordance with the provisions of section 20.

So the Collector may take possession upon service of Form H, ie the offer of the award, or at any time thereafter or on a certificate of urgency under s 19. Under our law formal possession may also be effected under s 22. Quite clearly I think ss 18 and 19 do envisage physical taking of possession. However, the Act does not lay down the manner by which physical possession is to be effected and it is the same as in India. Aggarawala states at p 328:

> The manner of taking possession is not prescribed but it is presumed the Collector would enter into occupation, or do something to indicate the fact.

But the Collector is not required to go to the land personally and there proclaims that he has taken possession. It is enough if he authorizes someone to go there and take possession: *Humuikari Bros* v *Asst Commissioner, Davwar Division*[1] at p 171. But there is a difference between the position in India and ours. In India, upon the taking of possession whether in ordinary cases (s 16) or in cases of urgency (s 17), the land vests absolutely in the government free from all encumbrances. Section 16 of the 1894 Act [India] reads:

> When the Collector has made an award under Section 11, he may take possession of the land, which shall thereupon vest absolutely in the Government free from all encumbrances.

In India the land immediately vests in the government upon the taking of actual possession. The Indian law does not admit the idea of 'formal possession'. 'If the land has *been acquired in accordance with* the provisions of ss 16 or 17(1), government or Commissioners cannot withdraw from acquisition of land. Government should take actual possession of land acquired. The question of taking symbolic possession or possession on paper do not arise.' (Aggarawala p 328.)

Under our law, in ordinary cases physical or actual possession of the land may be taken upon service of Form H or at any time thereafter or in urgent cases at any time on the expiry of 15 days after the notice in Form E is given (ie informing of the date of the inquiry), but no vesting takes place upon taking of actual possession of the land. Section 22(1) provides that the Collector '*shall* take formal possession' of any scheduled land by serving upon the occupier a notice in Form K. The schedule to Form K shall contain a copy of the list of lands gazetted under sub-s (1) of s 8. The registered proprietor of the land, if he is not the occupier shall also be served with a copy of the notice. The Collector, after completing Form K shall make a memorial in the appropriate register of titles as specified in sub-ss (2) and (3) of s 9 to the effect that the whole of the scheduled land or so much of it has been acquired and has vested in the State Authority (s 23). The Act is however silent as to when formal possession 'shall' be taken under s 22(1) and the making of the memorial in appropriate register of titles under s 23. By virtue of s 9(1) it appears that the Collector must make 'a note of the intended acquisition' so soon as a declaration under s 8 is published. So also it appears mandatory for the Collector to take 'formal possession' of any scheduled land by serving a notice in Form K on the occupier or proprietor of the land because of the word 'shall'. As the schedule to Form K must contain a copy of the list of lands gazetted under s 8(1) the taking of formal possession can therefore take place just about the time or soon after the declaration under s 8 is gazetted. At about the same time also, the Collector is to make a memorial in respect of all the scheduled land or any part of it to the effect that it has been acquired and has vested in the State Authority (s 23). It is at this point, in my view, that acquisition is effected or that there is the act of acquisition. I say so because of the happening of two things,

namely, the taking of possession and the 'vesting' of the land. The date of making the memorial must be taken to be the date of acquisition. This date cannot be earlier than the date of the gazette under s 8 because that is the time when the acquiring authority really decides that the lands are needed. But it can be on the same date as the date of the said gazette or so soon after. Therefore the incidence of inquiry, the making of the award or its offer or the physical taking of possession of the scheduled lands are of no relevance in the determination of the issue before me.

The case of *Hong Bee Realty Ltd* v *Collector of Land Revenue, Kuala Lumpur*[2] was cited before me. I must say, with respect, that this case did not decide as to when in law acquisition is deemed to have taken place. This was a case of an objection against the award of the Collector who made an award of $3,000 per acre while the objector was claiming a compensation based on $20,089.59 per acre. Abdul Hamid J (as he then was) increased the award to $5,000 per acre and said that the comparable method was the fairest in the circumstances of the case and that the date for the determination of the 'market price' was 3 January 1963, ie the date of the gazette under s 8. One can easily be misled by the sentence appearing in the headnotes which reads: 'The land was acquired on 3 August 1963.' The date '3 August 1963' was in fact the date when the Collector made the award, presumably the date of Form G.

Now, in the present case, the lease agreement commenced on 1 January 1977. The lands were gazetted under s 8 on 23 October 1981. As I have indicated above the date when the Collector makes a memorial under s 23 must be taken to be the date when acquisition under our law is deemed to have been effected. We are not told when the memorial was made in the present case. It is the Collector who must complete Form K (s 23). In it must be included as a schedule a copy of the list of the lands gazetted under s 8. That list is prepared by the Collector (s 7) for the purpose of the declaration in Form D (s 8(2)). The moment the Collector completes Form K, he shall make the memorial under s 23. In other words Form D and Form K can be prepared at the same time as the same list of lands is being used for both Forms D and K. As it is the Collector who makes the memorial upon the completion of Form K, theoretically the memorial can be made on the same day and if that is done on the same date then it cannot be earlier than the date of the declaration as gazetted under s 8. Furthermore, as I have said earlier, it is a declaration of the acquiring authority's 'decision', and in fact a final 'decision' that the lands are needed. In the circumstances of the present case, all those acts could have been completed well before the end of 1981 and I strongly believe that they were completed as there are no reasons to think otherwise. As such I find that the acquisition of the lands as leased under the 1977 lease agreement must have taken place within the first five years of the commencement of the agreement. This means that the compensation moneys must be apportioned on the 50% - 50% basis as between the parties. As the acquiring authority had already apportioned and paid to both parties on the same basis, then it is only fair and proper that the plaintiff company pays the cost of this application. I therefore so order.

Order accordingly.

Solicitors: *Vendargon & Partners; Peter Lai & Rajoo.*

Reported by *Yap Shao Sin*

Marble Terrazzo Industries Sdn Bhd v Anggaran Enterprise Sdn Bhd & Ors

MAHKAMAH TINGGI (PULAU PINANG) — GUAMAN SIVIL NO 22-45-88
ABDUL HAMID PK
24 OGOS 1990

Kontrak — Kepenyalahan undang-undang — Adakah perjanjian merupakan satu cubaan untuk menyerahhak — Adakah perjanjian itu menyalahi s 73 Kanun Tanah Negara 1965 dan tak sah — Kanun Tanah Negara 1965, s 73 — Akta Kontrak 1950, s 24

Acara Sivil — Injunksi interim — Permohonan injunksi interim diketepikan — Bolehkah perlaksanaan tertentu perjanjian itu diperintahkan — Akta Relif Tertentu 1950, ss 20 & 54

Pada 4 April 1988, plaintiff menuntut melalui tindakan sivil terhadap defendan pertama, sebuah syarikat, dan defendan kedua hingga kelima, pengarah-pengarah defendan pertama dan pemilik tanah lot 48606 mukim Sungai Raja, Daerah Kinta, Perak Darul Ridzuan. Plaintif menyatakan defendan kedua dan ketiga bersetuju secara lisan untuk membenarkan plaintif mengambil bahan batu daripada tanah tersebut tertakluk kepada beberapa syarat.

Oleh sebab perselisihan faham berkenaan satu fasal yang hendak dimasukkan oleh defendan-defendan, perjanjian bertulis tidak ditandatangani. Oleh kerana plaintif takut bahawa defendan-defendan melupuskan tanah itu atau membenarkan orang lain memasuki tanah itu, plaintif memohon penghakiman seperti yang terdapat dalam perenggan 14 pernyataan tuntutannya. Plaintif melalui saman dalam kamar ex parte, memohon injunksi interim dan pada 8 April 1988, mahkamah mengeluarkan injunksi interim yang, antara lainnya, menghalang semua defendan daripada membenarkan orang lain selain daripada plaintif atau ejennya untuk memasuki mengerjakan dan mengambil bahan batu daripada tanah tersebut sehingga kes ini diselesaikan atau perintah selanjutnya. Pada 13 April 1990, kesemua defendan memohon supaya perintah bertarikh 8 April 1988 diketepikan dan penghakiman ini adalah berkenaan permohonan itu.

Diputuskan, membenarkan permohonan pihak defendan:

(a) Setelah menimbang syarat permit dalam kes ini, peruntukan undang-undang, s 73 Kanun Tanah Negara 1965 dan s 24 Akta Kontrak 1950 dan autoriti-autoriti kes, dalam penghakiman mahkamah, permit yang dikeluarkan kepada defendan pertama tidak boleh dipindahhak dan apa-apa cubaan melakukan pemindahanhak di bawahnya adalah menyalahi undang-undang dan perjanjian untuk tujuan itu adalah